STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

In Re:

HON. M. T. THOMPSON, JR.
Judge, 70th District Court

SPECIAL MASTER:
Hon. Lawrence M. Glazer

_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HISTORY OF PROCEEDINGS

1.On August 7, 2003, the Michigan Judicial Tenure Commission issued Formal Complaint No. 72 against the Honorable M.T.Thompson, Judge of the 70th District.

2.On August 7, 2003, the Commission requested that the Supreme Court appoint a Master pursuant to the provisions of MCR 9.210(A).

3.On August 21, 2003, Respondent filed his Answer in which he admitted paragraphs 1 - 9, 11 - 12, and 15 - 24 of the Formal Complaint, and denied all other paragraphs.

4.On August 22, 2003, the Supreme Court issued an Order appointing the undersigned as Master.

5.The first pre-hearing conference took place in the Michael Franck Building in Lansing, Michigan, on September 9, 2003.

6.A second pre-hearing telephone conference was held on October 9, 2003.

7.On October 13, 2003, the Examiner filed a Motion to Amend Formal Complaint No. 72 and a Brief in Support.

8.A third pre-hearing telephone conference was on October 13, 2003.

9.A fourth pre-hearing conference and hearing on the Examiner's Motion to Amend the Complaint took place in Lansing, Michigan, on October 21, 2003. The Motion to amend was denied.

10. Hearing on Formal Complaint No. 72 commenced in Saginaw on October 30, 2003, continuing on October 31, 2003, November 3, 2003, November 4, 2003, and in Lansing November 19, 2003 and November 20, 2003.

11.On January 5, 2004, the completed transcript of the formal hearing was filed by the court reporter.

12. Counsel for the parties agreed to waive oral closing argument and to file initial briefs on January 26, 2004 and reply briefs on February 9, 2004, and the Special Master to file Findings of Fact and Conclusions of Law by March 8, 2004.

FACTUAL BACKROUND

Hon. M. T. Thompson (Hereafter "Respondent") was elected a Judge of the 70th Judicial District in 1997 and has held that office continually to the present day.

Respondent testified that he became interested in youth and school violence early in his judicial career, because so many youthful violent offenders were going to jail and 55% of them were African-American (as is Respondent) . " We had more in prison than in college" [testimony of Respondent, transcript page 773]. Respondent read various academic studies and reviewed existing anti-youth violence programs, which he found lacking in several respects, so he designed his own school anti-violence program, which he called "Making Choices, Facing Consequences" [Respondent, 772; the programs will be referred to as "Choices" in this Opinion]. He contacted a number of school officials from various school districts, in an effort to get this program implemented by the beginning of the 1999-2000 academic year [Respondent, 779-781].

Because Respondent's Choices program required the involvement of not only teachers, but also law enforcement officials and the courts (including conducting court sessions in schools), Respondent concluded that he would need an administrative order authorizing the program. He testified that he contacted his Regional Court Administrator, Bruce Kilmer, to seek such an order [Respondent, 782-783].

In 1999 two students at Colorado's Columbine High School engaged in a murderous shooting spree which caused a great deal of public discussion across the nation.

Originally, the Choices program had five components, but in the summer of 2001 Respondent added a sixth component, which he called "Bullyproof" [Respondent, 856]. "I knew that bullying was going to be a hot subject ... because of the resolution that the Michigan Board of Education just passed [requiring all school districts to adopt anti-bullying policies] and because I knew that secret service reports on Columbine indicated that most of the shooters in those cases were victims of severe bullying" [Respondent, 857-858].

In 2000 and 2001 Respondent had a series of contacts with State judicial and education officials regarding his programs; these contacts will be explored in some detail below in connection with Count II. At the same time, he had a series of contacts with directors of the Saginaw County Bar Association (hereafter "SCBA"), which led directly to the actions subject to Count I.

COUNT I - solicitation of funds

James Brisbois, Jr., a Saginaw attorney called by the Examiner, served as Vice President of the SCBA during the 2001-2002 period (The SBCA board of directors does not meet during the summer, and the Association's active year runs from September to June).

Brisbois testified that the SCBA had done annual Law Day programs for Saginaw County K-12 schools for many years. The programs usually included mock trials, essay contests and poster contests lasting several weeks. The SCBA Vice President is traditionally responsible for planning the next year's Law Day programs; as such, he or she is appointed as chair of the Law Day Committee. Months of preparation are required [Brisbois, 181-183].

Brisbois testified that planning for Law Day 2002 began somewhat later than customary, and there was a financial problem. Law Day program costs are paid from the SCBA treasury, and the cost is usually $5,000 to $8,000 to cover the dinner, the awards, the prizes, lunch, rental of the church, banquet, rental of the facility for the banquet and other expenses . However, as of late Summer 2001, "We were broke and didn't know how we were going to pull off Law Day because we already owed for the prior year's Law Day" [Brisbois, 188].

Brisbois testified, "I was trying to figure out where I could get some money to run Law Day. I didn't want to see it die for lack of funds on my watch. Judge Thompson came along and said I think if we changed this over to Bullying we can get some corporate sponsors." By "Bullying", Brisbois was referring to Respondent's program. This conversation took place at the September, 2001 meeting of the SCBA Board of Directors, before the first meeting of the Law Day Committee [Brisbois, 192-193].

Brisbois agreed that the primary factor in the decision to use Respondent's Bullying

program for Law Day was "the fact that it had the possibility of coming with corporate sponsorship" [Brisbois, 195]. In fact, the "script" for Law Day 2002 had already been written, and had to be discarded in order to use the Bullying program [Brisbois, 194].

Although not every witness agreed that the SCBA had been in dire financial straits, no witness disputed that the Law Day Committee scrapped its existing Law Day 2002 plan in favor of Respondent's program and accepted his offer to get corporate funding. These undisputed facts tend to support Brisbois's account.

When asked if Respondent had described how he would get money for the Law Day Committee, Brisbois testified, "I really didn't pay attention. He said he could get it and I really -- at that point there was so much to do I didn't care; if that took the finances off me, that's fine, go" [Brisbois, 196-197].

Thus "authorized", Respondent embarked upon his solicitation campaign.

FINDINGS OF FACT - Solicitation

The Examiner alleged and Respondent admitted (using the relevant paragraphs as numbered in the Complaint) as follows:

" 6. Respondent used official 70th District Court stationery to personally solicit donations to produce and implement his programs as well as for business correspondence pertaining to the production of his materials.

7. On December 3, 2001, Respondent wrote a letter on 70th District Court stationery to Terry Pruitt, Manager, State Public Affairs, Dow Corning Corporation, requesting that Dow Corning contribute $5000 toward his anti-bullying campaign.

8. On December 3, 2001, Respondent wrote a letter on 70 District Court stationery to Pete Shaheen, Horizons Conference Center, confirming Mr. Shaheen' s verbal agreement to contribute more than half the total cost of the Saginaw Bar Association's Annual May 2, 2002 Law Day Banquet.

9. On January 24, 2002, Respondent wrote Helen M. James, Assistant Vice President & Trust Officer, Citizens Bank Trust Administrative Committee, on 70th District Court stationery, to formally apply for a grant in the amount of $10,000 to finance two activities he wished to initiate, an anti-bullying campaign packet of materials and an anti-bullying puppet show.

11. Respondent telephoned John A. Decker, Esq., of Saginaw's largest law firm, Braun Kendrick Finkbeiner P.L.C., to personally solicit a contribution to present an anti-

bullying puppet show developed by Respondent and a group from his church, the Zion Puppet Warriors.

12. On January 7, 2002, Respondent wrote a letter to John A. Decker, on official 70th District Court stationery, following up on the telephone conversation and asking that his law firm donate $3000.00 to underwrite the cost of the anti-bullying puppet production.

15. On February 12, 2002, Respondent wrote a letter to Pat Sutton on 70th District Court stationery, after telephoning Dr Larry Hazen, to request that Anderson Eye Associates sponsor or co-sponsor a benefit concert at Saginaw Valley State University by the United States Air Force Orchestra's Strolling Strings which would cost approximately $10,000.

16. On February 12, 2002, Respondent wrote a letter to Terry Niederstadt, executive Vice President and Regional Retail Executive of Citizens Bank, on 70th District Court stationery, to request that Citizens Bank sponsor or co-sponsor a benefit concert at Saginaw Valley State University by the United States Air Force Orchestra's Strolling Strings which would cost approximately $10,000.

17. In addition to soliciting donations from Anderson Eye Associates and Citizens Bank, Respondent also solicited Dow Corning Corporation and Delphi Automotive Systems to underwrite the cost of having the United States Air Force Orchestra's Strolling Strings come to Saginaw for a benefit concert.

18. Respondent's name and judicial status were prominently featured at the top of advertisements for the benefit concert: "Honorable M.T. Thompson, Jr., 70th District Court presents: The United States AIR FORCE STRINGS ... Join Judge Thompson and the Strolling Strings as we celebrate America!" Respondent was also listed, with his court address and telephone number, as the contact person for further information about the program.

19. Respondent solicited contributions to finance some of the events and activities involved in his Making Choices and Facing Consequences program, his anti-bullying campaign, and/or law day activities, including but not limited to an anti-bullying puppet show, from Citizen's Bank Trust Department, Dow Coming Corporation, Delphi Automotive Systems (G.M.), Braun Kendrick Finkbeiner P.L.C., and Horizons Conference Center.

20. Respondent also wrote letters on 70th District Court stationery concerning work for his projects and donations to fund them to other individuals and companies, including, but not limited to, Lucy Allen, President and CEO of the Saginaw Community Foundation, Mary Princing of Princing & Ewend, and Paul Pecora and Lori Maxson of Bresnan Communications."

Since all of the above allegations are admitted, I find as a fact that they are true.

CONCLUSIONS OF LAW - Solicitation

Respondent admits, in his Proposed Findings of Fact and Conclusions of Law:

" B) Although Judge Thompson believed he could make the solicitations as part of what he perceived as a "general appeal" to help children, the solicitations constitute violations of Canon 5 (B)."

The Judicial Tenure Commission and Supreme Court have reviewed cases of solicitation by judges on several occasions.

IN RE SHANNON, 465 Mich. 1304 (2002) involved a District Judge who:

" permitted Eighth Precinct Police Officer Charlene Welch to sit at a table next to the podium in the courtroom with a bag of tickets from the Detroit Fire and Police Field Day.

(4) Respondent dismissed the tickets of defendants pleading responsible or who were found responsible and advised them to purchase tickets from the police officer. Some defendants were asked how many children they planned to take and if the number was too low they were told they needed to take more children. Others were told to "dig deeper," call someone, or go to an ATM machine. In one case a defendant was asked how much money he had. When the defendant said he had $116 on him, Respondent told him to buy $100 worth of tickets. The average ticket purchase was approximately $50 per person."

The Judicial Tenure Commission found, and the Supreme Court agreed, that:

"(5) Respondent's conduct, whether well intentioned or not, gave the appearance of using the powers of his position as magistrate to solicit money from defendants for a charitable cause.

(6) Respondent's conduct, as described in paragraphs (1) through (5) above, constitutes:

(a) Misconduct in office, as defined by Const 1963, art 6, § 30 and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice, as defined by Const 1963, art 6, § 30 and MCR 9.205;

(c) Irresponsible or improper conduct which erodes public confidence in the judiciary, contrary to Canon 2A of the Michigan Code of Judicial Conduct;

(d) Conduct involving the appearance of impropriety, contrary to Canon 2A of the Michigan Code of Judicial Conduct;

(e) Using, or giving the appearance of using, the prestige of office to solicit funds for an educational, religious, charitable, fraternal, or civic organization, contrary to Canon 5B(2) of the Michigan Code of Judicial Conduct."

In the case of IN RE THE HONORABLE BROWN, 468 Mich. 1228 (2003), a Circuit Judge established a non-profit corporation known as the "Coalition for Family Preservation.". The Judge also served as Chair of the corporation's board of trustees. A law firm conducted a golf outing as a fund raiser for the Coalition. Invitations to the fundraiser (which had been delivered to the Judge's office beforehand) stated that the Judge sponsored the golf outing, and both signs and the printed program for the golf outing prominently identified the Judge as the Coalition's founder. The invitations and program also described the Coalition as having 501(c)(3) status (meaning that the Internal Revenue Service had determined that contributions to it would be tax-deductible), when in fact the I.R.S. had made no such determination.

The Judicial Tenure Commission concluded, and the Supreme Court agreed, that Judge Brown's conduct constituted :

"(a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;"

and

"Individual solicitation of funds on behalf of a charitable organization, or permissive use of the prestige of the judicial office for that purpose,

contrary to the Code of Judicial Conduct, Canon 5B(2)"

Judge Brown was also found to be in violation of a number of other provisions, but it is unclear whether those findings related to the solicitation, the misrepresentation, or to using a coin flip to decide a contested visitation matter.

At times during the hearing in this matter, Respondent seemed to assert that he was not aware that solicitation is a prohibited act. However, I agree with the Examiner that not only is ignorance of the law no excuse, but the Michigan Supreme Court has made it clear that it is not an acceptable defense in judicial disciplinary proceedings. A judge's self-professed ignorance of a rule which all judges in this state are obligated to understand exhibits a fundamental disregard for the Code of Judicial Conduct. *In re Jenkins*, 437 Mich 15, 23 (1991). The prohibition on solicitations, no matter how worthy the cause, is absolute.

Moreover, the Region III Court Administrator, J. Bruce Kilmer, testified that in 1999, when Respondent first showed Kilmer his program materials,

> "... I warned him not to solicit money. That's why I said, don't ask. You cannot go to these people and ask for money." [Kilmer, 340]

Respondent also argues that he simply misinterpreted the Canon against solicitation. But the Michigan Supreme Court has indicated "good faith" is not an affirmative defense to misconduct charges. At best it only goes to mitigation of sanction. *In re Seitz*, 441 Mich 590, 724 (1983), *In re Lawrence*, 417 Mich 248, 267, fn 14 (1983); *In re Laster*, 404 Mich 449, 461 (1979).

Based on the above-cited case law, I conclude that Respondent Hon. M.T. Thompson's admitted actions in soliciting funds for the Law Day presentations constituted:

> Participation in civic and charitable activities that detract from the dignity of office or interfere with performance of judicial duties, in violation of Canon 5B;
>
> Individual solicitation of funds, in violation of Canon 5B(2);
>
> Misuse of the prestige of judicial office including misuse of court resources such as official 70th District Court letterhead to solicit funds;
>
> Misconduct in office, as defined by Const 1963, art , § 30 and MCR .205.

I cannot conclude that Respondent violated Canon 2C by using these funds "to advance personal business interests or those of others". I have seen no persuasive

evidence that Respondent enriched himself or anyone else. Although he controlled the account established at the Saginaw Bar Foundation, that account was used simply as a conduit for intake of grants and contributions, which were then used to pay for brochures, auditorium and other expenses of the Law Day activities.

The Examiner argues that Respondent advanced the business interests of his church by using the church's Zion Puppet Warriors in his program, paid for by the contributions which he solicited. However, I feel that Canon 2C's prohibition against advancing the business interests of others is intended to apply to a situation where a judge uses the prestige or power of his/her office to persuade a third party to throw business to a person of the judge's choice. In contrast, the wrongdoing here was the solicitation itself. The Zion Puppet Warriors were simply one of the "contractors" implementing the program, no more or less than the printing company which printed the advertising brochures. The point of the solicitation was to finance the program, not to enrich the contractors.

Of course, in using these funds to promote his programs, on which he held copyright, it may be argued that Respondent could reap financial rewards some time in the future, if the programs went into widespread use. However, in my view this is speculative.

What is not speculative is that Respondent used the funds to publicize not only the programs, but himself.

Exhibit 54 (the brochure promoting the "Bullyproof" Law Day program) is an example.

In this six-page brochure there are seven photographs. Respondent's image is in four of the seven, and his name appears in the caption of three of the seven; no other person's name is mentioned in any of the captions.

Respondent's name appears six times in the brochure, appearing in large type on the cover and back page.

Exhibit 55 (the brochure promoting the United States Air Force Strings' appearance) is headed by the statement:

"Honorable M.T. Thompson, Jr., 70th District Court presents: The United States Air Force Strings"

Respondent was up for re-election in 2002. In using the funds of others to publicize his programs, he created favorable publicity for himself, at no expense to himself or his re-election committee.

COUNT I - misrepresentation

The Examiner alleged and Respondent denied (using the relevant paragraphs as numbered in the Complaint) as follows:

" 10. Respondent misrepresented in his [Jan. 24, 2002] letter to Ms. [Helen] James [of Citizens Bank] that the Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrative Office, and the Michigan Judicial Institute agreed to jointly sponsor 'Making Choices and Facing Consequences' as a pilot program in ten to fifteen school districts throughout Michigan when none of those entities had agreed to do so."

"13. Respondent made the following misrepresentations in his letter to John A. Decker:

(A) Respondent misrepresented that it was the "Saginaw County Bar Association's 'formal request' that Braun Kendrick Finkbeiner P.L.C. assist with our 2002 Law Day effort by underwriting the cost of our elementary school anti-bullying puppet production" when the Saginaw County Bar Association had neither authorized nor had knowledge of Respondent's solicitation made purportedly on its behalf.

(B) Respondent misrepresented that the Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrative Office, and the Michigan Judicial Institute agreed to jointly sponsor "Making Choices and Facing Consequences" as a pilot program in ten to fifteen school districts throughout Michigan when none of the entities in question had agreed to sponsor the program."

" 14. Respondent had brochures prepared advertising the Saginaw Bar Association Law Day and featuring his anti-bullying program without the approval of the Bar Association Law Day Committee."

The standard of proof in disciplinary cases is preponderance of the evidence. *In re Ferrara*, 458 Mich 350, 360 (1998); *In re Jenkins*, 437 Mich 15, 18 (1991); *In re Loyd*, 424 Mich 514, 521-522 (1986).

FINDINGS OF FACT - the James letter (Paragraph 10 of the Complaint)

It is not disputed that Respondent sent a letter dated January 24, 2001 on 70th District Court letterhead [Exhibit 62] to Helen James, Asst. Vice President, Citizens Bank, and the following statement was in the letter:

"Enclosed you will find a brochure which gives an overview of Making Choices and Facing Consequences, a Middle School Crime Prevention Program. The Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrator's Office and the Michigan Judicial Institute have agreed to jointly sponsor Making Choices and Facing Consequences as a pilot program in 10 - 15 school districts throughout Michigan. We are currently in the process of selecting the school districts, completing our program materials, and working out an implementation schedule." [emphasis supplied]

The letter went on to explain that Respondent's Bully-proof program was a component of the Choices program, and requested that the Bank grant $10,000, $5,000 of which would be used to fund presentation of the Bullyproof program to Saginaw County elementary school students.

The first issue is one of fact: whether the above-quoted statement in Respondent's letter to Ms. James was true.

Respondent testified as to the basis for his belief that the three agencies had agreed to co-sponsor his program as a pilot project:

"Q. Now, at that April 20th, 2001 meeting were there any agreements reached between you and the other three men in attendance [i.e., Ferry, Weatherspoon and Bowling]?

A. Yes.

Q. What, if any, agreements were reached at that April 20th, 2001 meeting?

A. I'm going to say there were four agreements reached.

It was agreed that the State Court Administrator, the Michigan Judicial Institute, and the

Michigan Department of Ed would co-sponsor the program in ten to fifteen school districts, as a school pilot in the ten to fifteen school districts around the State, and we developed, while sitting there, a list of at least seven of those schools.

The second agreement was that there would be a joint letter issued by the three sponsoring entities to all of these school districts inviting them to a July meeting in Lansing.

Mr. Ferry wanted to be sure that he had, as he put it, his most progressive mind of District Court Judges doing the program, that it was conducted in places where there was a good relationship between the schools, the courts, the prosecutor, and the sheriff.

And it was agreed, No. 2, that there would be this joint letter that would go out inviting people to that meeting.

The third agreement was I explained to them that I felt the materials needed some additional work and that I felt they needed to be aligned with certain Michigan educational standards and that I was not capable of doing that, and they agreed that they would hire a graduate student from Michigan State to work

with me to do that.

The fourth issue that came up,

Dr. Weatherspoon felt that we needed some testing

expert who could do a pre-test and a post-test, and he

agreed that he would find that expert, and he did

subsequently.

Those were the four agreements." [Respondent, 801 - 802]

There is an internal inconsistency in the above testimony. As Respondent noted (and as Dr. Weatherspoon further explained), no program can become qualified for inclusion in a public school curriculum until its educational validity has been assessed and approved by qualified experts. As of the April 20 meeting, this was yet to be done. Thus, it seems evident, even from Respondent's own testimony, that the Department of Education could not unconditionally endorse Respondent's program as of the date he asserts the Department agreed to co-sponsor it.

Moreover, Respondent gave further testimony which also seems to contradict his assertion that the three agencies agreed, at the April 20 meeting, to co-sponsor his program:

" This was not a legally enforceable contract. I

never represented it to be a legally enforceable

contract, and I don't think anyone ever understood

it to be that.

We had an agreement as to what course of

action we would take and our commitment to that

course of action. As I indicated to you, a large

part of what I did [before becoming a judge]

was labor negotiations where we

moved forward in small steps, and every time you make one of those steps forward, I had become accustomed to documenting that step in the form of a confirming letter as we continued to move toward what might have been ultimately a legally enforceable agreement. But I never viewed that as a legally enforceable agreement." [Respondent, 918-919]

The significance of the above-quoted testimony is Respondent's recognition of the meeting's result as no more than an intermediate "step forward" on the way to a possible agreement.

John Ferry, the State Court Administrator, recalled discussion of a proposed meeting with 10 to 15 school superintendents at the April 20 meeting, but he testified that he never agreed to co-sponsor or endorse the Respondent's program, and neither did anyone else. The only agreement Ferry recalled was to explore setting up the meeting with the superintendents.

" Dr. Weatherspoon had some interest in the program as it related to inclusion of part or all of the program, on at least a test basis, in a curriculum.

As I recollect, we discussed the notion of a meeting with or -- yeah, arranging of a meeting of ten to 15 School Board superintendents to explore their willingness to adapt this curriculum for use in schools." [Ferry, 91]

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Q. At any time during that meeting did you agree to co-sponsor, partner with, jointly engage in, Judge

Thompson's program that he was bringing to you?

A. No. We have never agreed to co-sponsor the program. It's not something that really is appropriate for us to co-sponsor.

THE MASTER: How about endorse?

THE WITNESS: No.

Q. (BY MR. FISCHER:) Did you endorse the program?

A. No, we did not endorse the program.

Q. Did anybody endorse the program while you were there?

A. No. I think that the only outcome was arranging this meeting with a group of school administrators to determine their interest in adapting the curriculum for broader use.

Q. But as of April 20th, 2001, there was no agreement between the State Court Administrative Office and Judge Thompson to endorse, sponsor, partner with, or any other type joint arrangement regarding the Making Choices or any other program of Judge Thompson's?

A. No." {Ferry, 91-92]

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"Q. Are you aware of any agreements that were reached at that April 20th meeting?

A. The agreement, as I recollect, was to explore the possibility of setting up this meeting with the School Board folks.

Q. And that was all?

A. Right." [Ferry, 93]

Ferry never met with Respondent again on this subject, nor did they have any telephone discussion or written communication regarding it [Ferry, 99].

Kevin Bowling, then director of the Michigan Judicial Institute, gave his recollection of the April 20 meeting:

"Q. Mr. Thomas asked you about other things that may have been agreed to at the April 20th meeting, such as putting together a test program in ten to fifteen schools. Do you recall that testimony?

A. Yes.

Q. Who was it that was going to be putting together this test program in ten to fifteen schools, was it going to be the Judicial Institute?

A. The program itself was Judge Thompson's program. The schools would be schools that would be -- would have been identified, as I recall it, by, with Dr. Weatherspoon's assistance through the Department of Education.

Q. But as of April 20th, 2001, the Judicial Institute had

not agreed to participate in sponsoring any of these

programs as a test in ten to fifteen schools, had it?

A. No.

Q. And neither had the State Court Administrative Office?

A. That's correct.

Q. And neither had the Department of Education?

A. That's correct." [Bowling, 515]

Dr. Donald Weatherspoon testified that he first learned of Respondent's program when Respondent sent a copy of the materials to the chair of the State Board of Education, who passed them along to Dr. Weatherspoon, at that time the Asst. Superintendent for Safe Schools [Weatherspoon, 562].

Subsequently, Dr. Weatherspoon and an adviser to the Michigan Association of School Boards traveled to Saginaw to meet with Respondent and learn more about his program [Weatherspoon, 563].

Dr.Weatherspoon's next meeting with Respondent was the April 20, 2001 meeting at which Ferry and Bowling were present.

"Q. At that meeting was there discussion of the Department

of Education sponsoring any of the programs that are

involved in the materials you have in front of you,

Exhibits 58 A, B and C?

A. I don't know whether there was a discussion about us

sponsoring it. There was discussion about our

interest...

Q. You were interested in the program that he had?

A. Yes.

Q. Does the Department of Education have programs such as these or other types of programs?

A. Well, you have to excuse us, but does the State have money? We didn't have money then either. We didn't have any money. There was no appropriation to pay for this kind of a project.

Q. And if there were money, did you have the authority to bind the Department of Education?

A. No. I would have to work that through the State Superintendent." [Weatherspoon, 566-567]

"Q. The second paragraph [of Respondent's April 24, 2001 letter contains the statement]:

"It is my understanding that the State Court Administrator's Office, the Michigan Judicial Institute, and the Michigan Department of Education, will jointly sponsor Making Choices and Facing Consequences as a pilot program in ten to fifteen school districts throughout the State of Michigan during the upcoming school year." Do you see that sentence?

A. Yes, I do.

Q. As of April 24th, 2001, was that a true statement?

A. In principle, yes.

Q. How was it true in principle?

A. That we had agreed to move forward with a joint effort to make this happen.

Q. When you say that, had you reached an agreement as to how you were going to do that?

A. No." [Weatherspoon, 571-572]

"Q. So using that with the word sponsor, in that narrow context, as you understood it, that would not be true? You had not agreed to sponsor any programs yet?

A. That's correct.

Q. When you say, 'Yes, I think in principle that it was true,' that you had agreed to do something with Judge Thompson?

A. That's correct.

Q. But you hadn't agreed what it was that you were going to do?

A. That's correct. ...

Q. (BY MR. FISCHER:) Had you agreed to anything specific at the April 24th meeting as of the -- excuse me, as of the April 20th meeting?

A. It was our intent to move forward with the pilot

program. The range of schools that would be included on a voluntary basis was ten to fifteen." [Weatherspoon, 571-572]

"Q. At the end of the April 20th meeting had you reached any agreement with Judge Thompson as to the Department of Education sponsoring, partnering with, endorsing, having any type of giving a stamp of approval, anything along those lines, with Judge Thompson, with regard to these programs?

A. We agreed that we would continue to have discussions and to explore ways where we might be able to use the program, where the program could be used in school districts." [Weatherspoon, 567]

"Q. (BY MR. FISCHER:) Were there any specific things that you had agreed to on behalf of the Department of Education as of April 20th, 2001?

A. Our interest in the program continued and we, meaning the Department, were looking to guidance damages [?], if you will, from the Court Administrator's Office, so that this could become a State-wide program on a

voluntary basis.

Q. Had you agreed to do anything specific?

A. No.

Q. Was the Department of Education prepared to move forward with this plan without the State Court Administrator's Office or the Judicial Institute?

A. No." [Weatherspoon, 574-575]

"Q. Did you ever meet face-to-face with Judge Thompson between the April 20th meeting and whenever it was that Judge Thompson appeared at the MASB conference?

A. I don't recall that.

Q. Did you speak with him by phone at all during that time?

A. Probably did, but, again, you know, I just don't remember.

Q. In any of those phone contacts that you may have had with him, did you tell him that the Department of Education had agreed to anything specific with regard to implementing these programs?

A. Not to my knowledge." [Weatherspoon, 576]

Thus, it is clear that all three of the State officials at the April 20, 2001 meeting came away with the firm impression that none of them had made any firm commitment for their respective agencies to sponsor, or even endorse, Respondent's program. Moreover, none of those three individuals communicated any other conclusion to Respondent (or to

anyone else) between the April 20 meeting and January 24, 2002, when Respondent wrote to Helen James at Citizens Bank, "The Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrator's Office and the Michigan Judicial Institute have agreed to jointly sponsor Making Choices and Facing Consequences as a pilot program in 10 - 15 school districts throughout Michigan."

Additionally, Respondent implicitly acknowledged a lack of meeting of the minds by sending letters to the three other participants, seeking confirmation that the four agreements described in his testimony, above, had been reached:

"Q. (BY MR. THOMAS:) Now, after the April 24th, 2000 -- I mean the April 20th, 2001 meeting, did you ever send out any type of confirming letter to Dr. Weatherspoon, Mr. Ferry, Mr. Bowling, concerning the meeting that had taken place on April 20th, 2001?

A. Yes.

Q. Why did you do that, why did you send a confirming letter regarding that meeting with them?

A. I have been practicing law for over 25 years, I have tried hundreds of lawsuits in every stage in the State and Federal system, I know that four people can witness the same event and participate in the same discussion and come away with a different understanding. A confirming letter is just that. It's something that's sent to make sure that there's been a meeting of the minds, that we have reached a mutuality of assent and they were operating with a common understanding. And so I sent that letter for those purposes.

And in that letter I cite all four of those

agreements that I discussed here.

Q. And what date was that letter sent?

A. April 24th, 2001." [Respondent, 803]

Respondent received no response to that letter (Exhibit 63) from any of the three recipients [Respondent, 807], so on April 29 he sent another letter (Exhibit 64), this time attaching a draft of a letter he wished the three individuals to sign. That draft letter said, in part:

"We are pleased to announce that the Michigan Supreme Court Administrator's office, the Michigan Judicial Institute, and the Michigan Department of Education have joined forces to launch such a bold new initiative. It is called Making Choices . .."

Respondent also received no response to this second letter.

During the hearing it was Respondent's argument that this lack of response entitled him to believe that the three other participants concurred with his descriptions of agreements reached at that meeting. However, I believe that these letters speak more loudly of Respondent's state of mind than anyone else's. They tell us that he had his doubts, and these doubts were not assuaged by the lack of response to his first letter, so he sent the second letter.

Based on all of the above-cited evidence, I find that the statement, "The Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrator's Office and the Michigan Judicial Institute have agreed to jointly sponsor Making Choices and Facing Consequences as a pilot program in 10 - 15 school districts throughout Michigan", was not true at the time Respondent made it in his letter to Helen James. Furthermore, a reasonable person in Respondent's position would not have believed the statement to be true.

CONCLUSIONS OF LAW - The James Letter

The Complaint asserts that Respondent has violated Rule 8.4(b) of the Rules of Professional Conduct for Attorneys, which prohibits:

> "Conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, which reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer"

What is the meaning of "misrepresentation" in the context of a judicial misconduct proceeding? Is it Common Law fraudulent misrepresentation?

In KASSAB v. MICHIGAN PROPERTY INS, 441 Mich. 433 (1992), the Supreme Court affirmed that:

"The elements constituting actionable *fraud or misrepresentation* [emphasis added] are well settled:

The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [Hi-Way Motor Co v Int'l Harvester Co, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), quoting Candler v Heigho, 208 Mich. 115, 121; 175 N.W. 141 (1919).]"

If the above-quoted elements are accepted as defining "misrepresentation" for purposes of Rule 8.4(b), then the Examiner's failure to prove that the Bank relied upon the statement in deciding to contribute must be fatal to this charge.

However, I note that Rule 8.4 names "misrepresentation" and "fraud" as separate and distinct violations. This can only mean that the Rule's "misrepresentation" is different than Common Law "fraudulent misrepresentation", because the latter is synonymous with "fraud", per *Kassab*.

I also note that another Rule of Professional Conduct, Rule 4.1, deals with something that appears to incorporate some, but not all, of the elements of fraud:

"In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."

Moreover, I am not aware of any case in which the Supreme Court has applied the above-quoted Common Law fraud definition to judicial misconduct. In most cases in which judicial misrepresentation has been found, the respondent judge's conduct was so egregious that legal analysis was deemed unnecessary.

For example, In re FERRARA, 458 Mich. 350 (1998) the Respondent Circuit Judge's comments were surreptitiously recorded by her ex-husband and later published by a newspaper. Her comments recorded on the tapes included religious and ethnic slurs.

The Supreme Court specifically found Judge Ferrara to have engaged in misrepresentation when she (a) held a news conference and called the recordings "fake", denying that the voice heard on them was hers, when in fact it was her voice; (b) attempted to introduce a fabricated letter through a witness at the Judicial Tenure

Commission hearing; (c) gave misleading testimony at the Judicial Tenure Commission hearing to the effect that her ex-husband had planted a "bug" at her home.

IN RE CHRZANOWSKI, 465 Mich. 468 (2001) the respondent judge had made inaccurate statements to police who were investigating the murder of the wife of the respondent's lover. In her initial interview with the detectives, the respondent judge had stated that her relationship with her lover had lasted only from February through March, 1999 (when in fact it had lasted from January 1998 to August 1999) and that she had not spoken with her lover since immediately after his wife's death (when in fact, she had spoken to him since then).

A Special Master was assigned to the discipline case and found as a fact that "the substance, if not the detail" of the respondent's statements was accurate and that:

"as a matter of law... unless a statement by a judge is a lie, i.e., 'a false statement made with deliberate intent to deceive', there is not misconduct or conduct clearly prejudicial to the administration of justice within the meaning of Const 1963, art 6, sec. 30, justifying a recommendation of discipline."

The Judicial Tenure Commission deferred to the finding of fact but disagreed with the above-quoted conclusion of law

The Supreme Court held that the Judicial Tenure Commission could have and should have overturned the Master's finding of fact, and that the respondent's statements to the police were not mere inaccuracies, but were deliberate falsehoods (at 482).

In one case the Supreme Court did, albeit briefly, appear to refer to at least some of the elements of Common Law fraudulent misrepresentation.

IN THE MATTER OF LAWRENCE, 417 Mich. 248 (1983), "It was alleged that two letters written by respondent to the Oakland County Concealed Weapon Licensing Board in support of an applicant for a gun permit contained material misrepresentations that were influential in the decision to issue a gun permit."

The Supreme Court ruled:

"Upon de novo review of the record, we find the allegation to be supported by the evidence. The chairman of the licensing board testified he was influenced by the letters submitted by respondent in issuing Mr. Archer an unrestricted gun permit. At a special hearing in 1980 after the general permit was issued, Mr. Archer admitted that he never went into Detroit, and the permit was then changed to a restricted permit in relation to his business activities. This action supports the conclusion that the misrepresentations in respondent's letters influenced the board in its initial decision.

"We find the allegation to be supported by the evidence and that such conduct is clearly in violation of DR 1-102(A)(4)[fn13] and Canon 2 of the Code of Judicial Conduct and,

thus, constitutes misconduct."

IN RE THE HONORABLE BROWN (discussed above), 468 Mich. 1228 (2003), the respondent Circuit Judge admitted that she had acted negligently in failing to review invitations and promotional materials for a golf outing which was held by a law firm to benefit a charity of which she was founder and president, even though the materials had been delivered to her office a month ahead of time.

The invitations not only identified the respondent judge as the sponsor of the golf outing, they also identified the charity as a 501(c)(3) organization (meaning that the I.R.S. had ruled that contributions to it would be tax-deductible) when, in fact it had not been so approved.

There was a finding of solicitation, but there was no finding of misrepresentation.

However, the case is of limited value as precedent because it was a negotiated settlement, and because the Judicial Tenure Commission expressly noted that it was a case of non-feasance rather than malfeasance:

"In the present matter, the use of Respondent's name for the invitations to attend the Coalition golf outing was unauthorized. However, Respondent was aware of the ethical restrictions on
the use of her name, and was negligent in insuring that the material produced in relation to the golf outing met all requirements set forth in the Code of Judicial Conduct. "

It is difficult to derive a black-letter rule from the above sources. However, I believe that they can be read to mean that at minimum, Rule 8.4(b) prohibits (a) the making of an untrue statement of fact (b) which a reasonable person in the speaker's (or writer's) position would know to be untrue, (c) and which a reasonable person in the speaker's (or writer's) position would expect to be relied upon by a third person or persons to motivate a particular action or to motivate the third person to refrain from a particular action.

This interpretation is consistent with the proposition (discussed above) that Rule 8.4(b) misrepresentation is intended to prohibit conduct which falls short of meeting all of the elements of Common Law fraud. It is also consistent with the idea (expressed in Canon 2, and which permeates the Code Judicial Conduct) that:

"A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen..." [emphasis supplied]

By the above definition, Respondent's actions constitute misrepresentation, and I therefore conclude that he violated Rule 8.4(b).

Since Respondent's actions violated Rule 8.4(b), then by definition his conduct also "violates the standards or rules of professional responsibility adopted by the Supreme Court", contrary to MCR 9.104.

FINDINGS OF FACT - the Decker letter (Paragraph 13A of the Complaint)

It was not disputed that on January 7, 2002 Respondent wrote a letter, on 70th District Court stationery, to John A. Decker, at the Braun Kendrick Finkbeiner law firm. The letter (Exhibit 27) requested that the law firm contribute $3,000 to underwrite the costs of the Zion Puppet Warriors' presentation of an anti-bullying program to elementary school students, and an advertising brochure for the program.

The letter repeated Respondent's statement in the James letter (" The Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrator's Office and the Michigan Judicial Institute have agreed to jointly sponsor Making Choices and Facing Consequences as a pilot program in 10 - 15 school districts throughout Michigan. We are currently in the process of selecting the school districts, completing our program materials, and working out an implementation schedule."

The findings of fact and conclusions of law given above in connection with the James letter apply equally to the above-quoted statement in the Decker letter.

The Decker letter also contained the statement:

"Please accept this letter as the Saginaw County Bar Association's formal request that Braun Kendrick Finkbeiner P.L.C. assist with our 2002 Law Day effort by underwriting the cost of our elementary school anti-bullying puppet production."

The factual issue is whether it was true, as implied in the statement, that Respondent had the Saginaw County Bar Association's authority to request funding on its behalf (this relates solely to the issue as to whether the statement in the Decker letter was true; not to whether the SCBA could "authorize" Respondent to solicit funds in violation of the Judicial Canons).

The statement would be true if either (a) the SCBA Board of Directors authorized Respondent to solicit funds for the Law Day program, or (b) the SCBA Board of Directors delegated such authority to the Chair of the Law Day Committee, who sub-delegated it to Respondent.

James Brisbois testified that as Vice President of SCBA for the 2001 - 2002 year he was appointed *ex officio* to serve as co-chair of the Law Day Committee; the other co-chair was from the Lawyers Auxiliary (however, Brisbois usually referred to himself as "Chair", not "co-Chair", and all of the testimony from others about the Law Day Committee implied that it was Brisbois who ran the Committee).

Law Day is actually a series of programs presented annually by the SCBA and the Lawyers Auxiliary [Brisbois, 180]. It takes months of preparation and is a "massive project". The members of the Law Day Committee were "pretty much anybody that wanted to be on the Law Day Committee" [Brisbois, 185 - 186].

Brisbois testified:

Q. (BY MR. FISCHER:) Did the Bar Association, excuse me, did the Law Day Committee authorize Judge Thompson to solicit anybody on behalf of the Law Day programs?

A. Yes.

Q. Specifically authorize Judge Thompson to do solicitations, is what I'm asking?

A. Yes.

****

Q. You see where it says: "Please accept this letter as the Saginaw County Bar Association's formal request that Braun, Kendrick assist with our 2002 Law Day effort." Do you see that sentence?

A. Yes.

Q. Did the Saginaw County Bar Association make any requests or direct -- did the Bar Association direct Judge Thompson to make a request of Braun, Kendrick

along the lines as solicited in this letter?

A. What we did when Judge Thompson said he could get some money, is say, "Fine, go get it." [218]

****

Q. (BY MR. THOMAS:) Mr. Brisbois, the decisions that you made in terms of delegating authority and duty to my client to go out and do the things that you have testified he did, in relationship to May 1, 2002 Law Day, like soliciting corporate sponsors, you know, ordering the banquet tickets, and things along those lines, did you have authority to delegate those duties to my client?

THE MASTER: Did he personally?

Q. (BY MR. THOMAS:) Did you personally as Co-Chair of the Law Day Committee?

A. Yes.

Q. Was there any limitation put on your authority in that regard by the Board of Directors, of which you were also a member?

A. I don't believe so. [264]

Thus, Brisbois testified both that the SCBA Board delegated full authority to him, that he delegated fund-raising authority to Respondent, and he testified that the SCBA Board directly authorized Respondent to raise funds for the Law Day program.

Ruth Buko testified that she was a SCBA board member and member of the Law Day Committee for Law Day 2002. [534]

Unfortunately, Buko's testimony did not include any detailed description of what her role on the Law Day Committee was.

> "My recollection was we discussed that someone needed to help with Law Day and my name came up, and like I said, I didn't really want to do it because of the time constraints. I said -- I was slow to say -- somebody assigned it, I guess nobody in particular assigned it, but we all kind of agreed that I would be the person." [538]

Buko's testimony as to the Board's decision was also ambiguous:

> "Q. So isn't it true that at the September meeting the Board of Directors had appointed, or nominated, my client, Judge Thompson, to conduct a push for greater corporate sponsorships?
>
> A. Well, if you're strictly reading from the Minutes, then yes. I mean, you just read it. But that's not my independent recollection of that meeting.
>
> Q. Well, I'm going by the Minutes.
>
> A. Okay. Then yes.
>
> Q. By the way, do you feel that you have a good recollection of the events that occurred back on

September 5th, 2001?

A. Not really." [546 - 547]

Kenneth Kable testified that he was an attorney with the Braun Kendick Finkbeiner firm and was a member of the SCBA Board of Directors at the time in question. [639]

Kable's recollection of the Board's decision was somewhat different than Brisbois's recollection:

"Q. Did the Bar Association, through it Board of Directors, through it Boards of Directors, authorize any formal request of the Braun, Kendrick, Finkbeiner Law Firm?

A. No. I am aware that various organizations donate either in-kind or other funds for, as I indicated before, for example, printing tickets or purchasing tables for students at the banquet, and other costs associated with the Law Day.

But those funds I believe are raised through the Law Day Committee. They are not raised by the Saginaw County Bar Association.

THE MASTER: The Law Day Committee of what?

THE WITNESS: The Law Day Committee that is Co-Chaired by the Vice-President of the Bar Association and a representative of the Auxiliary and other members of the two organizations who wish to participate, as we call the Law Day Committee." [647 - 648]

However, he later testified:

Q. And did the Board of Directors delegate the authority and the duty to carry out all the Law Day planning and preparation, was all of that authority and duty delegated to the Law Day Committee?

A. I think in general terms that would be correct. [672 - 673]

****

Q. So if Mr. Brisbois made any decisions with the Committee, let's say, for example, where the luncheon was going to be held, he would not be required to get approval for that from the Board, is that correct, or am I wrong?

A. No, I think you are correct. He would make those arrangements but he would report to us that our banquet was going to be here, or whatever, which he did.

[674]

****

Q. Would it be fair to say, Mr. Kable, that in appointing Jim Brisbois -- I want to rephrase that.

He really wasn't appointed. He was elected. And as a result of that he would preside for the Bar Association over Law Day; is that correct?

A. That's correct. [677]

****

Q. And as a member of the Board of Directors didn't that seem to sit just about right with you, you had -- the authority had been delegated to Jim Brisbois and there was an assumption that he was taking care of what needed to be taken care of; isn't that correct?

A. Those were the reports that we had." [678]

Finally, Kable reiterated his understanding of the SCBA Board's action:

"Q. As a result of you now being aware that that language is included in the October 2001 Saginaw County Bar Association Minutes, would you agree that Judge Thompson was authorized by the Board of Directors to solicit monies from your Law Firm and any other potential corporate sponsor?

A. I don't think I would necessarily agree with that, no. It was not my understanding and I wasn't present in October, nor was it my understanding that we, as a Board at any time, had ever authorized the solicitations, but that's so . . . I don't know if that's answering your question or not." [687 - 688]

Thus, to summarize Kable's testimony, he believed that the SCBA Board had delegated all Law Day authority to Brisbois, but had never given any solicitation authority directly to Respondent.

David Hoffman testified that he served as President of SCBA for the year 2000-2001, and served on the Association's executive committee with the incoming president and vice president after that. [727 - 728]

"Q. Was there discussion at any meeting that you were present at regarding Judge Thompson taking the lead in soliciting corporate or any sponsors for money?

A. Yes.

Q. Which meeting was that?

A. There was a Fall meeting, whether [should be "where"] it was discussed that he would do that, that he would attempt to secure some of that, and, then, there were discussions at this March meeting after the fact raised by Miss Peters. [747]

****

A. My recollection is that Mr. Brisbois and Judge Thompson were going to do that and because of Judge Thompson's position Mr. Brisbois was going to have to actually collect any money.

Q. What do you mean by "Judge Thompson's position"?

A. Because he was a Judge.

Q. What does that mean?

A. He couldn't go out and solicit money. He couldn't go out and raise money himself.

Q. How did you know that?

A. It was pretty obvious he was a sitting District Judge."

[749]

In the above-quoted testimony, Hoffman seems to use the terms "solicit" and "collect" interchangeably, and he was not the only one. Brisbois initially testified that at the September Board meeting there was discussion that Respondent, as a judge, could not "solicit" funds. However, he later corrected himself:

"Q. Mr. Brisbois, isn't it true that the Minutes indicate that he could not, quote, "Actively," receive donations?

A. True.

Q. Now, I want to take you back to your earlier testimony on Direct Examination when you indicated to Mr. Fisher that a determination was made that he could not **solicit** moneys, that really wasn't one hundred percent accurate, was it, Mr. Brisbois?

A. That's true.

Q. What was discussed at that meeting was the fact that it would be problematic if people sent him money because he is a Judge, and he **received** those monies, true?

A. True." [244 The words in bold were emphasized in the questions]

The importance of this is that the Minutes make clear that at the September meeting there was a consensus that Respondent was authorized to do **something** regarding fund-raising for Law Day. The respective Board members may not have all had exactly the same understanding as to what that something was; some thought that he was authorized to "solicit" but not receive; others apparently thought the opposite: that he could "collect" but not "solicit"; and I have the impression that a third group saw no distinction. But the Board clearly expressed that money was needed to achieve a successful Law Day, and that it was willing to accept Respondent's offer to make that happen in return for featuring his programs. Whatever ethical hurdles existed, if any did, they would be

Respondent's problem and not the Board's.

Jeffrey Collison testified that he is the current President of SCBA, and has been a board member for the past five years. [993]

"Q Now, when Mr. Brisbois was appointed or received actually that appointment to oversee the Law Day Committee because of the fact that he was the vice president, was he given autonomy over the Law Day Committee activities or did the board of directors retain autonomy and authority over the Law Day festivities?

****

THE WITNESS: I can answer it this way, as a member of the board of directors at the time, I knew that Jim Brisbois as vice president was going to be in charge of the Law Day proceedings. As to what issues might crop up and those that needed to be addressed by the board, I had no clue, at that time, as in practice, the Law Day Committee and Law Day, and if there was something to be raised it could be raised with the board; that's what I would have expected." [1001]

Candidly, I find the above-quoted testimony not wholly devoid of ambiguity, but include it for the sake of completeness.

Finally, **Christopher Swartz**, a Saginaw attorney, testified that he was not on the Board of directors of SCBA, but did serve on the Law Day Committee for 2001 - 2002

[1004-1005]:

"Q Based upon your attendance at these meetings, was it your understanding that the Saginaw County Bar Association had specifically authorized and encouraged my client to solicit money on behalf of the Law Day event?

A Yes." [1009 - 1010]

Although this testimony does not go to the truth of the matter asserted (i.e., it is hearsay as to what the Board of Directors actually did), it does tend to prove that the members of the Law Day Committee expressed the belief that Respondent was authorized by the Board to solicit.

The Minutes:

The Minutes of the September 5, 2001 SCBA Board meeting (Exhibit S) reflect:

"Discussion regarding funding of Law Day and alternate possibilities to Law Day Banquet. Corporate sponsors have declined. Issue needs to be reviewed. Darryl Zolton will send letter to all non-dues paying members. He will also attempt a greater push for corporate sponsors."

"Susan Whaley-Brady will talk to Law Day Committee regarding push for corporate sponsors. Jim Brisbois, Jr. is the chairperson of Law Day. Mary Ann Ferris from the Auxiliary is the co-chairperson."

"President's Report. ... Judge Thompson recommended tying in educationally relevant topic with Law Day script, i.e. bullying."

The Minutes of the October 3, 2001 SCBA Board meeting (Exhibit S) reflect:

> "Review of Minutes September *5,* 2001 minutes were corrected to reflect that Judge Thompson would be the individual to attempt a greater push for corporate sponsors (and not Darrell Zoiton - Paragraph 2 - "Treasurer's Report"). With that amendment, the September *5,* 2001 minutes were approved."

***

> "During the above discussions, Vice President Brisbois pointed out that in the event corporate sponsors can be secured to help with Law Day, our cash flow should improve. Mr. Brisbois reported that Judge Thompson would be willing to co-chair a committee for soliciting funds. However, he cannot actively receive donations. As such, it was requested that a second Board member act as co-chair, to be available in the event correspondence or some type of presentation needs to be made to sponsors. Ruth Buko graciously agreed to accept the appointment conditioned upon being relieved of her duties on the Lawyers Promotion Committee. President Whaley-Brady indicated that she believed that Peter Shek would be assuming a leadership role. Mr. Brisbois indicated that he would be setting up a meeting within the next couple of weeks for Law Day and would specifically inform Ms. Buko. At the time of this meeting, all concerned will sit down and decide how best to proceed with respect to corporate donations."

Close analysis of the Minutes is revealing. First, they confirm that the Board recognized that financing of Law Day was going to be a problem. Secondly, they confirm that Respondent's offer to help obtain financing from corporate sponsors was accepted.

It is true that no formal motion to authorize Respondent was made. However, a review of the three Minutes admitted in evidence reveals that the Board seldom acted through formal motions. Most decisions were made by discussion and informal consensus.

The most important point addressed in the Minutes - and the most subtle -is the issue of exactly what the Board manifested as its assignment to Respondent. It seems clear that the Board agreed that Respondent was to do *something* regarding obtaining "corporate sponsorship". But it also seems clear that the Board recognized some form of limitation on what Respondent *could* do in seeking that sponsorship.

One must keep in mind that Minutes are drafted "on the fly", and neither the drafter nor the members who subsequently approve the Minutes can anticipate a particular controversy over exactly what words were used.

On the one hand, we have the statement, "However, he [Respondent] cannot actively *receive* donations [emphasis added]". On the other hand, in the very next sentence we find, "As such, it was requested that a second Board member act as co-chair, to be available in the event correspondence or some type of *presentation* needs to be made to sponsors [emphasis added]."

The first sentence implies that Respondent cannot *receive* donations. The second sentence implies that he cannot *solicit* donations.

The key is that the speaker was Brisbois. Whatever words the note-taker may have thought he or she heard, it is clear that Brisbois was the Board member most directly

affected by Respondent's situation; he was not going to be the one who let Law Day fail "on my watch". And it is Brisbois, called by the Examiner, who testified most extensively on just what was authorized by the Board:

"Q. You see where it says: "Please accept this letter as the Saginaw County Bar Association's formal request that Braun, Kendrick assist with our 2002 Law Day effort." Do you see that sentence?

A. Yes.

Q. Did the Saginaw County Bar Association make any requests or direct -- did the Bar Association direct Judge Thompson to make a request of Braun, Kendrick along the lines as solicited in this letter?

A. What we did when Judge Thompson said he could get some money, is say, 'Fine, go get it.'

***

Q. But he was specifically authorized to go out and solicit corporate sponsors?

A. Yes.

***

Q. Now, I want to take you back to your earlier testimony on Direct Examination when you indicated to Mr. Fisher that a determination was made that he could not solicit moneys, that really wasn't one hundred percent accurate, was it, Mr. Brisbois?

A. That's true.

Q. What was discussed at that meeting was the fact that it would be problematic if people sent him money because he is a Judge, and he received those monies, true?

A. True." [Brisbois, 244]

Brisbois certainly believed that the Board had delegated Respondent the authority to "go get" money for Law Day. He also believed that he (Brisbois), as Law Day Committee Chair, had that authority from the Board and that he had, in turn, delegated that authority to Respondent. I found Brisbois credible. He had the most detailed recollection of the critical meetings. His testimony was internally consistent. These events were very important to him at the time they occurred. He had no greater or lesser reason than any other Saginaw County attorney to shade the truth because Respondent was a local Judge.

Finally, it is difficult to conclude that Respondent "misrepresented" his status in the Decker letter, because one of Decker's fellow members of the law firm, Ken Kable, was also a member of the SCBA Board of Directors. The letter was really directed at the firm - not Decker personally - and the firm must be charged with Kable's knowledge as to what the SCBA Board had authorized Respondent to do.

Reviewing all of the above-quoted evidence, it is my finding that the Examiner has not sustained the burden of proving that Respondent's implicit representation (that he was authorized by SCBA to solicit Law Day contributions) was untrue, or that a reasonable person in Respondent's position would have believed it to be untrue.

FINDINGS OF FACT - the Law Day brochure (Paragraph 14 of the Complaint)

The Examiner alleges:

" 14. Respondent had brochures prepared advertising the Saginaw Bar Association Law Day and featuring his anti-bullying program without the approval of the Bar Association Law Day Committee."

I have found no evidence in the record which would support the above allegation.

The Law Day Committee did not keep Minutes [Brisbois, 196; Collison,1003]

The members of the Law Day Committee who testified were Brisbois, Buko, Swartz and Respondent.

Brisbois testified:

"Q. And you have said that in October is when you first got the Committee organized to start doing the work for preparing for Law Day; is that correct?

A. I believe so.

Q. So what action, if any, did you take at that time regarding making a decision whether to use the program that Judge Thompson was proposing or to use the program that you might otherwise have used?

A. I think that was actually determined before we met in October." [190]

Buko simply did not remember much about the Law Day Committee; she testified:

"Q. (BY MR. THOMAS:) Miss Buko, let me ask you this: If you know, are there multiple roles that my client was playing concerning Law Day other than this pursuit of corporate sponsors for the event?

A. Yes.

Q. Was he taking care of arranging the speaker for the event?

A. I don't know about that.

Q. Was he taking care of arranging for a facility where everybody could go and eat?

A. I believe so.

Q. Was he taking care of arranging for the printing of tickets that would be sold for the event?

A. I don't know about that.

Q. You don't know about that.

But what you do know is that aside from the push for added corporate sponsors my client was carrying out other functions for Law Day; is that correct?

A. Yes." [553- 554]

Swartz's testimony addressed only the issue of whether Respondent was authorized to solicit funds. He was not asked about Respondent's authority to prepare substantive programs or conduct advertising for Law Day.

Thus, I find that the allegations of Paragraph 14 of the Complaint are not proven.

Findings of Fact - Count II: Failure to Cooperate with Commission Investigation

The Examiner alleged and Respondent admitted (using the relevant paragraphs as numbered in the Complaint) as follows:

21. On February 3, 2003, the Commission staff sent Respondent a letter that included a request for copies of his Making Choices and Facing Consequences" and "Bullyproof' program/materials.

22. On February 6, 2003, Respondent telephoned the Commission Executive Director and objected to the request.

23. On February 20, 2003, Respondent sent a letter directed to the Executive Director in response to the staff's February 3, 2003 letter. He provided some additional information but refused to provide the materials, asserting they were irrelevant to the allegations of misconduct.

24. On March 20, 2003, Respondent was sent a subpoena requesting he provide the previously requested materials by March 31, 2003. He failed to comply.

Since all of the above allegations are admitted, I find as a fact that they are true.

Conclusions of Law - Failure to Cooperate

As stated above, Respondent does not deny the allegations. Instead, he asserts, in his Brief:

"on December 11, 2002, the Examiner mailed Judge Thompson a supplement to the 28-day letter requesting additional information and documents. Judge Thompson telephoned the Examiner with questions about his request for additional information and documents. The Examiner was very rude, condescending, and abrasive. Thompson Tr. pg. 880.

By letter dated January 7, 2003, Judge Thompson responded to the Examiner's December 11, 2002 letter. He also requested copies of the two grievances which had been filed against him. To date, neither the Examiner nor the Judicial Tenure Commission has ever provided the grievances to Judge Thompson."

and:

"Judge Thompson basically told the Examiner that he was not going to give him any additional documents until he provided him with copies of the two grievances. The only documents which Judge Thompson had not provided at that point were copies of the Making Choices And Facing Consequences program materials and the Bullyproof materials. Thompson Tr. pgs. 882-886. On February 20, 2003, Judge Thompson sent the Examiner a confirming letter. Thereafter, Judge Thompson hired the undersigned, who promptly provided the Examiner with the requested information and documents. Thompson Tr. pg. 886.

In light of the forgoing, the Master must decide whether Judge Thompson's conduct constitutes a failure to cooperate as contemplated under MCR 9.200 et seq., or whether the failure to promptly provide non-essential documents resulted from a personality conflict between the Examiner and Judge Thompson. "

The above argument may go to mitigation, but is not a defense. I am aware of no case which holds that due process requires the Judicial Tenure Commission's disclosure of either the identity of accusers or the substance of their statements during the investigatory phase of a proceeding.

Moreover, the Examiner is correct in his assertion, which I adopt:

"Grounds for action against a judge are established in MCR 9.205(B). Misconduct in office includes, but is not limited to, 'failure to cooperate with a reasonable request made by the commission in its investigation of a judge.' MCR 9.205(B)(1)(f). A judge is personally responsible for his or her own behavior. MCR 9.205(A). Additionally, Michigan Court Rule 9.208 (B) provides: 'A judge, clerk, court employee, member of the bar, or other officer of a court must comply with a reasonable request made by the commission in its investigation.' "

The Judicial Tenure Commission's request for documents was reasonable, and there is no evidence that anything prevented Respondent from producing the documents.

I therefore conclude that Respondent failed to fully cooperate with an investigation by the Judicial Tenure Commission, in violation of MCR 9.104(7).

Dated:

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Lawrence M. Glazer